ENGLISH SUMMARY

M/F and beyond

Gender registration by the state and the legal position of transgender persons



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Summary

This research has explored:

> to what extent and under which conditions it is possible, also in light of international legal obligations, to leave gender undetermined in certain cases, and the legal and practical problems that may arise as a result and/or the problems that would actually be solved.

The research was commissioned by the WODC (*Wetenschappelijk Onderzoek en Documentatie Centrum – Research and Documentation Centre)* of the Ministry of Security and Justice, at the request of the Department of Legislation and Legal Affairs.
This question originates from a motion of Pia Dijkstra, Member of Parliament, in response to questions in parliament concerning the function of the current (binary) gender registration.[1]

Background
Since 1986 it is legally possible for transsexuals to change their legal gender from M (male) to F (female) or vice versa (art. 1:28 of the Dutch Civil Code (*Burgerlijk Wetboek*, BW). In mid-2014, the conditions for such a change were made more flexible. There are no legal provisions regarding other transgenders, that is those who do not identify as male nor as female, those who identify as both male and female or those who in any other manner do not feel comfortable in the male/female dichotomy.
Registration of gender is mandatory and there are only two options (M/F). The Netherlands has one exception to this rule that regards the situation of newborn babies with ambiguous sexual characteristics. On their birth certificates it can be noted that it was not possible to determine the baby's gender (art. 1:19d section 1 BW). Underlying this exception is the expectation that within a maximum of three months the gender will have been established. In practice that almost always seems to be the case, but the law does leave room for other situations (art. 1:19d lid 3 BW). Once a person is registered as M or F in the Netherlands, it is no longer possible to delete that registration or change the registered gender into something else (such as X).
Data contained in the civil status register governs the 'municipal personal records database' (*basisregistratie personen* (BRP); prior to 6 January 2014 the *Gemeentelijke Basisadministratie Persoonsgegevens*). Gender is one of the personal details in the BRP that is taken from the civil status register. The BRP provides government bodies and third parties with data that these bodies need to fulfil their duties. Data are provided only in so far as is necessary for the performance of their duties. Thus, the tax authority receives the details necessary to levy taxes and screening organisations send invitations for screening programmes, such as for breast cancer. That means that transgenders may be approached, regarded and addressed as someone they are not. Identity documents (except for driver's licenses) also include information on gender, which may cause confusion and embarrassing confrontations. In this way people whose appearance or gender expression does not correspond with their legal gender risk being confronted with and forced to explain their situation to customs officers, employers, medical practitioners and others.
The research as requested by the WODC is directed at examining to what extent it is possible to offer this group of people the possibility to not register a legal gender or to register their gender as something else than M or F. Also the potential benefits, especially for those concerned, are explored,

1 *Kamerstukken II*, 2012-2013, 33351, nr. 10, Motie van het lid Pia Dijkstra (Motion of Member of Parliament Pia Dijktstra), 2 april 2013.

as well as the potential problems that changes in the system may cause, for example for policy making and research but also for the application and implementation of legislation.
The relevance of the research question is not limited to transgenders who do not fit the gender divide, but may also be important for transsexuals, in particular before and during transition (from one gender to the other) and for people with an intersex condition/DSD. The latter group consists of persons who physically one way or the other do not quite match the medical standards for men and women (sexual characteristics, chromosomes, anatomy etc.).
Although people with an intersex condition, just like other 'cispeople'[2], generally feel comfortable in the gender dichotomy, sometimes the current system of binary gender registration may nevertheless be oppressive to them. A (possible) stumbling-block occurs when a child is born with ambiguous sexual characteristics. Parents may feel pressured to register their child, despite the ambiguity, as a M or F.[3] Sometimes this also leads to medical intervention to adjust the child as much as possible to its legal gender, even though the Dutch law offers the possibility not to register the child as M or as F. Sometimes it only becomes clear at a later age – often during puberty – that someone belongs to the 'other' gender, in which case the legal gender has to be corrected as an 'error' (art. 1:24 BW).[4]

Method

To examine the research question and sub questions, several sources have been studied, such as literature, national and international legislation and regulations, parliamentary papers and case law. At the start of the research a number of exploratory interviews have been held with relevant (interest) organisations, with individuals concerned and with experts (including scholars). The selection criteria for these interviewees was the expectation that they could give useful suggestions for the direction(s) in which the legal and practical problems, as mentioned in the research mandate, and possible solutions for these problems could be sought. The results of these interviews have been influential for the research, but cannot be considered as representative for the current views in the Netherlands concerning the desirability of broadening the options for gender registration as personal data. For that the group of interviewees was too small and too selectively chosen.
The developments in the field of gender registration and (legal) gender identity in six other countries have, with the help of jurists from the countries concerned, been mapped out and compared with each other and with the Netherlands. The countries are Australia, Germany, India, Nepal, New Zealand and the United Kingdom. The aim of this comparison was, in particular, to determine to which extent the Netherlands can learn from the experience of these other countries with alternative forms of gender registration.
To obtain an impression of the relationship between the law in theory as described in the reports and the experiences of transgenders in daily life, one or two transgenders in each of the six countries have been asked to briefly comment on the expert report.
In addition to the review of legal literature, a survey among civil registrars has been conducted. The survey was directed at mapping out the current practices regarding registration of gender, and more specifically at compiling a list of the practical and legal problems which could be expected if the current registration system would be changed. In total 196 civil registrars participated in the survey.
The *Agentschap Basisregistratie Persoonsgegevens en Reisdocumenten* (*Agentschap BPR*, the (national) Office for the Registration of Municipal Personal Records database and travel documents) has, for the purpose

2 The term cis refers to the group of persons who feel comfortable in the gender assigned to them at birth, so the largest part of the Dutch population. 'Cis' is the opposite of 'trans'.
3 See e.g. Greenberg 2012, Reis 2013.
4 Some feminists have also argued for the abolition of (binary) gender registration, because it confirms that men and women are not equal but different and that this difference is important enough to register. This last argument will not be considered in this research.

of this research, conducted a query (that is, feed a research to a database) to determine how many people in the population registration (BRP) were registered without a mention of their gender, in the end of December 2013 in the Netherlands.
Finally, an inventory was made of Dutch legislation and regulations whose applicability or enforceability could be problematic if the registration system would be adapted to offer people who do not fit in the dichotomy male/female the possibility not to register themselves, or to register differently.

Rationale gender registration
Since the moment that the population registration was introduced in the Netherlands in 1811, gender has always been one of the required personal details. Although little has been written about the rationale thereof, it seems to be associated with gender specific rights and duties, such as the military conscription for men. Over the years many of the provisions which directly discriminated on the basis of sex have been repealed. However, some provisions remain which create different legal effects for men and women (such as obtaining of legal maternity or paternity). This means that the (presumed) original rationale has not completely disappeared. Nowadays information concerning gender is widely used for the formulation and implementation of policies. An example thereof is (statistical) research on school dropout rates. Data from the BRP is only provided when an authorisation decision has been issued. In these authorisation decisions the necessary data, which the applicant needs for the activity, is listed. In the legislation which allows for the authorisation decisions, information about gender nearly always seems to be considered necessary, even when it is not immediately evident why the information is of importance.
An important function of information concerning gender as personal data, is the use thereof in travel and other identity documents in order to increase the speed of identification procedures (for example custom control at airports). For New Zealand that was a reason – at least for now – not to insist on removing gender as standard personal data in travel documents at the *International Civil Aviation Organisation* (ICAO, a specialised agency of the United Nations). New Zealand does make use of the opportunity provided by the ICAO guidelines to include X, next to M and F, in travel documents. Australia does the same. India currently offers a third option, 'others'. It is not known whether the fact that 'others' does not conform to ICAO-standards leads to problems in international traffic. Nepal is busy adding a third option to travel and other identity documents. In the United Kingdom the discussion concerning X as a third option for travel documents has flared up again in the summer of 2014. Because in the Netherlands the data as contained in the population registration (BRP) are leading, the gender of a person whose sex has been registered in the BRP as unknown, will be stated on any travel document as X. In practice this apparently hardly occurs, if ever.

Law and practice
The law offers the possibility to mention the gender of a newborn baby with ambiguous sexual characteristics as 'could not be established' on the birth certificate. The expectation is that within three months this will be changed to M or F. If this does not occur, than the indeterminateness becomes definite and can later, if necessary, only be repaired as an 'error'. Transsexuals can under certain conditions change their legal gender from M to F or vice versa. Since the 1st of July 2014 it is no longer necessary that one physically 'has been adapted as much as possible to the opposite sex' or that one 'no longer is capable of giving birth to or conceiving a child'. An expert statement that the person in question has 'the permanent conviction of belonging to the opposite sex' remains necessary (art. 1:28a BW).

17 of the 196 civil registrars reported in answer to the survey to having registered the gender of a baby as not established at least once.[5] With the exception of two situations, this was always changed to M or F within three months. The query conducted by the *Agentschap BPR* showed that, besides the 66 foreign-born persons with an unknown gender, at the end of December 2013, only one person born in the Netherlands was registered with an unknown gender. For the foreign registered cases, it is likely that the majority consists of persons who, when registering for the BRP, did not possess an authoritative document (*brondocument,* 'source document') in which their gender was stated (such as is the case with Italian and German identity cards). It is possible that one or two of these 66 foreign residents have an undetermined or unknown registered gender, if their national legal system has the option to register gender in other ways than simply M or F. If so, that would be reason to register them in the same way in the Netherlands. This is comparable with the situation of a Dutch person whose gender as a baby has been registered as 'cannot be determined' in accordance with art. 1:19d BW and which was never changed afterwards. It could not be further specified in view of the protection of privacy.

There are different possibilities for the law to recognize other gender identities than male or female. One option would be to stop with the registration and indication of gender. A less drastic option would be to no longer make registration compulsory, either for everyone, or for specific groups. A third option is to add a 'box' (or several boxes), for example X, but other variations are conceivable. The *Australian Capital Territory* has recently introduced five options for birth registration. Extra options could be offered as a choice for everyone or only for specific groups. Options for specific groups may be offered on the basis of self-identification or on an external assessment, comparable to the expert statement in the case of transsexuality.
In the survey civil registrars were asked if they foresaw problems if gender would no longer be registered or if the possibility would be extended to state gender as 'undetermined'. A majority of the civil registrars who answered this question foresaw problems when information on gender would no longer be available, especially for research, identification and cross-border travels. Also the impossibility for recipients of the BRP data to address people as Mrs./Mr. is often mentioned. Furthermore, the majority prefers the registration as 'undetermined' over the omission of a gender. They expect that leaving a blank space will cause confusion, because no mention of gender might also be an administrative mistake. Some civil registrars warn for the risks of stigmatisation that a 'third box' could bring along and point to privacy concerns. Also, problems are foreseen in the processing of forms which are based on the sex-dichotomy, and warnings are given that possibly other legislation will prove ill-equipped for alternative gender categories or persons without (known) gender.
A majority of the persons concerned and interest groups with whom exploratory talks were conducted, would prefer that gender is no longer registered at all, or that at least it would no longer be included on identity documents. The persons concerned also would like to see that both government bodies as well as private companies no longer, or at least not systematically ask for information on gender. The computer forms in which gender is a mandatory field (for example requesting money back from the Dutch National Railways in case of delay) are a recurring source of irritation, especially when they appear to serve no purpose. Interviewees did indicate that they could not completely envisage the problems abolition of registration might lead to. In general, the impression was that in many, if not all, cases a solution could be found in self-identification if necessary. They regarded as an absolute minimum, that any alternative options, in so far as it would be available only to a limited group, should never be imposed as an obligation on the members of

[5] The civil registrars who filled in the survey had an average of 22,5 years of service.

that group, because of the risk of stigmatisation. This view was also endorsed by foreign experts and transgender contacts.

Developments abroad

The foreign reports show that there is increased attention to the possibilities of breaking the traditional dichotomy of gender. In India and Nepal this occurs through recognition of a 'third gender' and by taking specific measures to improve the position of that group. In Australia and New Zealand a few regulations have been introduced related to alternative registrations and mention of gender on identity documents. At the end of 2013, Germany passed legislation which makes it possible for babies with ambiguous gender to first not be registered (comparable to art. 1:19d BW). Only in the United Kingdom there have not yet been any decisions which could be considered as breaking the dichotomy. Prior to the legislative changes that were introduced abroad, it has not, or barely, been ascertained whether international agreements might constitute a barrier or which consequences the changes would have for the application and implementation of national legislation.

Legal barriers and bottle-necks

Agreements on the registration, collection, exchanging and mentioning of data on gender, are many, both on the national and international level. Generally, these agreements as such do not stand in the way of changes to the system, because it is hardly ever specified *how* the gender ought to be mentioned. Another manner of registering gender or abandoning such registration could encounter problems at the level of implementation because regulations and forms may, for example, be unfit to handle the changes.

Legal recognition of the existence of people is a human right and therefore an obligation for the government (article 7 UN Convention on the Rights of the Child, CRC). However, there is no evidence that this obligation extends to the registration of information concerning gender. It arguably can also not be advocated on the basis of the right of children to know their family relations (article 8 CRC).

On the other hand, there is, at least at this point in time, no human rights obligation to recognize other legal gender identities than M and F. However, the development concerning gender identity is going at a fast pace, partly because more and more countries recognize the importance of gender for personal identity. This also counts for the Netherlands, which has expressed its support of the (non-binding) Yogyakarta Principles, in which the importance of self-determination and self-identification is highlighted. From a human rights perspective a stimulus, rather than a hindrance, for breaking the binary gender registration can be recognized.

Although gender is considered to be a 'suspect' ground for discrimination in virtually all human rights and non-discrimination treaties, laws and other regulations,[6] in national and international rules concerning privacy protection gender is not seen as a sensitive identity feature which should be protected. Only when the situation concerns a sex transformation is information protected. In Australia the policy regarding this issue has recently been tightened and it has been decided to provide information concerning gender only to recipients of the different registration systems when that is really necessary.

An inventory of provisions in the Dutch legislation and regulations shows that there remain many provisions in which gender somehow plays a role. Besides provisions which concern the collection of gender data as such, there are provisions in which sex specific terms (for example father/mother)

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[6] Suspect grounds are identity features that are generally regarded as features on the basis of which people may not be treated differently, such as race, gender or religion. See Loenen 2009, specifically p. 47-49.

are used. That happens especially in the provisions on family law, on the protection of pregnancy, on gender-segregated facilities and in a limited number of laws which are specifically focused on males or females, such as the military conscription. Also the exceptions in the equal treatment legislation (positive action and gender specific functions and professions) can be included herein.

Whether changes in the gender registration system will cause difficulties for the application or implementation of such legislation depends – besides the type of provision (is a distinction intended?) – on the form that a possible change would get and the personal and material scope thereof.

In several of the countries studied it is possible for individuals to not always mention or register their gender in the same way: one can for example leave the birth certificate unaltered, but change the gender on the identity document. In New Zealand one can, through a declaration, choose for an M, an F or an X in the travel document every time one requests a new document.

Such 'partial registrations' would not be possible in the Netherlands, since in the Netherlands the birth certificate is guiding for the BRP, from which in turn other sector registrations derive their data. At the same time that means that, in the situation that the gender of someone is registered in the BRP as 'unknown', that person's gender will be stated as X on that person's travel document (regardless of gender status in any other but legal respect).

Conclusion

The main question of this research was:

> To what extent and under which conditions is it possible, also in light of international legal obligations, to leave gender as undetermined in certain cases, and which legal and practical problems may arise as a result and/or which problems would actually be solved?

In response to this question, it can be concluded that there is increasing attention for gender identity. A growing number of countries realise that the idea that all persons are either male or female is not sustainable. A number of countries have introduced new options by which the classic dichotomy is broken to a certain extent, but this remains an exception to the general rule.

Breaking the gender dichotomy in the Dutch population registration would follow the trend of increased awareness on the importance of recognizing self-experienced gender for identity. There are practically no international restrictions placed on the Dutch policy-making freedoms concerning a change of the current system of gender registration. Because the national law is riddled with references to specific gender, numerous small but also larger issues must be reckoned with, varying from unsuitable forms to legal parentage. The extent of the problems to be expected depends on the extent of the changes introduced: the larger the group that will be able to (and want to) use alternative options, the more varied the problems will be.

Expanding the system, but perhaps even more restraint in providing information about gender and a more flexible attitude of the government and other bodies with regard to informal requests for a different or no specification of gender would rid transgenders and others of many of their annoyances and problems. Gender increasingly seems to be perceived as a 'sensitive' identity feature, but so far is not regarded, nor protected as such in privacy regulations.